United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2106

To be argued by
Edward M. Chikofsky

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Number 76-2106

JOHN STANLEY WOJTOWICZ,

Appellant,

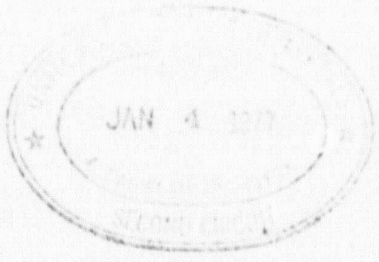
— against —

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF



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UNITED STATES COURT OF APPEALS
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JOHN STANLEY WOJTOWICZ, :

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Preliminary Statement

This brief is submitted on behalf of Appellant John Stanley Wojtowicz ("Wojtowicz"), in reply to specific arguments and statements made in the brief of Appellee United States of America. Failure to reply to a particular matter in the Government's brief means only that the matter has been sufficiently addressed in Wojtowicz' main brief or that it is insignificant with respect to the disposition of this case.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE GUILTY PLEA'S VOLUNTARINESS

A. Failure To Hold A Hearing

The District Court committed clear error in failing to afford Wojtowicz an evidentiary hearing upon his claims that his guilty plea was involuntary, and that he was incompetent at sentencing, in light of the detailed factual affidavits and news accounts submitted to the Court below, as well as his attorney's Rule 35 motion, which was part of the "files and records of the case". 28 U.S.C. §2255.

The Government argues strenuously, and erroneously, that the plea and sentence minutes, by themselves, clearly refute Wojtowicz' claims of mental incompetence and coercion, and that, therefore, an evidentiary hearing is unnecessary. This argument is disingenuous in the extreme.

Wojtowicz has raised detailed and controverted questions of fact concerning his attempted suicide hours

before sentencing. These allegations are corroborated substantially by contemporaneous news accounts, as well as his attorney's Rule 35 affidavit, which specifically drew the court's attention to Wojtowicz' "having inflicted injuries upon himself just prior to sentence" and referred to his "highly nervous state". (Exhibit 6, Appendix).

For the Government to assert, in light of these detailed, and corroborated, factual allegations, that "the motion and the files and records conclusively show that [Wojtowicz] is entitled to no relief" within the meaning of 28 U.S.C. §2255, absent an evidentiary hearing, is to engage in transparent sophistry. Cf. Sanders v. United States, 373 U.S. 1, 19-20 (1963); United States v. Masthers, 539 F.2d 721, 728 (D.C. Cir. 1976).

It need hardly be reiterated, as this Court has done on innumerable occasions, that, where a claim of mental incompetency at the time of trial, plea or sentence is raised in a §2255 proceeding, a hearing ordinarily will be required. United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971); 2 Wright, Federal Practice and Procedure, §599 (and cases cited therein); and other cases cited in Appellant's main brief at 19-23.

Moreover, while the Government seeks to make moment of the unorthodoxy of Wojtowicz' pro se pleadings in the Court below*, it is manifest that, in evaluating the record, this Court's inquiry extends well beyond the proverbial four corners of Wojtowicz' handwritten affidavit, which, by itself, still provides sufficiently precise factual allegations, detailing his suicide attempt and his disoriented condition at sentencing, to warrant a hearing. (Exhibit 10, Appendix).

Besides Wojtowicz' affidavit and his attorney's Rule 35 motion, the Court below had before it a meticulously detailed and lengthy news account of plea and sentencing, written by a reporter who attended both proceedings. This news account describes not merely the suicide attempt and Wojtowicz' extreme difficulties and disorientation at sentencing, but also details the manner in which Ernest Aron, Wojtowicz' male paramour, inveigled him to plead guilty in the first place, and, in fact, coached his answers at the plea proceeding. While the Government

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* Besides taking cognizance of the usual solicitude to which pro se pleadings ordinarily are entitled, Haines v. Kerner, 404 U.S. 519, 521 (1972); Haymes v. Montanye, ___ F.2d ___, Dkt. No. 74-1208 (2d Cir. December 28, 1976) at 6816, this Court should note that Wojtowicz requested the appointment of counsel on no less than four occasions in the Court below. None of those requests was ever ruled upon by Judge Platt. (See Record on Appeal: motions and

(Footnote continued on following page)

seeks to cast aspersions on the credibility of the reporter, it is clear beyond cavil that the credibility of such a witness, as well as the ultimate contested questions of fact, are matters for the trier of fact to resolve after an evidentiary hearing.*

Thus, the Court may not properly limit itself merely to the sufficiency of Wojtowicz' pro se affidavit in denying an evidentiary hearing. As this Court has stated, in this context:

> ...In making that threshold determination the court looks primarily to the affidavit or other evidence proffered in support of the application in order to determine whether, if the evidence should be offered at a hearing, it would be admissable proof entitling the petitioner to relief. Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974)(emphasis supplied).

(Footnote continued from preceding page)

letters dated June 11, 1975; September 22, 1975; February 17, 1976; and March 22, 1976.) It was, thus, not until the instant appeal that, for the first time, counsel was afforded the opportunity to properly organize and present Wojtowicz' contentions.

* Proceeding pro se in the Court below, Wojtowicz, through ignorance and inexperience, failed to provide an affidavit from the author of this article. However, appellate counsel has ascertained that the reporter is, in fact, available to testify at an evidentiary hearing.

(Footnote continued on following page)

Thus, on this record, the District Court committed clear error in failing to afford Wojtowicz an evidentiary hearing on his claims of incompetency at sentencing. Floyd v. United States, 365 F.2d 368, 376 (5th Cir. 1966); cf. Moore v. United States, 464 F.2d 663, 666 n.3 (9th Cir. 1972) with Brewster v. United States, 437 F.2d 917 (9th Cir. 1971).

B. Incompetency At Sentence

The Government attempts to dissuade this Court from remanding this proceeding for an obligatory evidentiary hearing by placing excessive reliance on the purported propriety of the sentencing proceeding, consisting of colloquy between Wojtowicz and Judge Travia. This facially unexceptionable colloquy, so the argument goes, "conclusively refutes" Wojtowicz' claims that he had either attempted suicide, on the

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It should be noted, as well, that The New York Times also reported on the suicide attempt and blood-soaked bandages at sentencing. See Appellant's main brief at 14-15.

one hand, or was rendered incompetent by such attempt, on the other, even though Judge Travia made no specific inquiry into the reason for his obvious confusion and physically-deteriorated condition.*

On the basis of this record, that argument is a very weak reed upon which to lean.

The record of sentencing in this case reveals that Wojtowicz was brought into court in manacles and blood-soaked bandages. He repeatedly expressed his desire both to discharge his present attorney as well as to withdraw his plea. Judge Travia, while, in fact, engaging Wojtowicz in extensive colloquy regarding his dissatisfaction with counsel and desire to replead, made his hostility obvious to such a course of action on Wojtowicz' part.

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* Curiously, the Government alleges, inconsistently, both, that, "there was nothing in the record below to support [Wojtowicz] claim of having attempted suicide beyond the bare allegation in his 1976 letter", and that Wojtowicz' attorney "was fully aware of [his] condition at the time of sentencing" (Government's brief, at 15, 20).

Wojtowicz, thus, was hardly in a position to have voluntarily waived his right to withdraw his plea and substitute counsel. Given his presently deteriorated condition, as well as Judge Travia's expressed disinclination to substitute counsel, Wojtowicz may well have felt, as did the petitioner in United States ex rel. Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975), that he had no real choice but to acquiesce.

Significantly, Judge Travia made no specific inquiry whatever into Wojtowicz' mental state at sentencing, nor did he inquire at all into the reasons for Wojtowicz' injuries or confusion (factors which were not ignored by the reporters attending sentencing). United States v. Masthers, supra.

The derogation of the trial judge's responsibility to scrutinize, sua sponte, the defendant's condition, in this case, was far more compelling than in the usual sentencing context. cf. Saddler v. United States, 531 F.2d 83 (2d Cir. 1976). Wojtowicz sought to withdraw his guilty plea at sentencing by alleging that his plea had been pressured by his attorney and his male paramour. He also accused his attorney of malfeasance and failure to zealously represent his interests. While such

allegations are hardly unique, when they are raised by a defendant in obvious physical distress, whose mental condition previously had been called into question, the District Judge obviously was required to make some inquiry into the defendant's present mental state. cf. United States v. Silva, 418 F.2d 328, 331 (2d Cir. 1969). Judge Travia, however, made no inquiry whatsoever.

Under similar circumstances, the D.C. Circuit, in Pouncy v. United States, 349 F.2d 699, 700 (D.C. Cir. 1965), concluded that the trial court erred in not further investigating the defendant's competency, after the defendant accused his lawyers of conspiring with the Government against him, and said, in the jury's presence, "Plead me guilty to the charge." The court pointed out that, although a "conclusory" mental examination indicated the defendant was competent, later developments may cast doubt on the prediction.* See

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* The competency report, in this case, was prepared seven months prior to Wojtowicz' suicide attempt. Besides failing to disclose the extent of Wojtowicz' examination, other than personal interview, or the tests employed, cf. Floyd v. United States, supra, 365 F.2d at 376 n.11, the report is couched in a tone of something less than complete impartiality. See United States v. Pogany, 465 F.2d 72 (3d Cir. 1972). For criticism that "impartial" experts are inevitably partisan, see Diamond, The Fallacy of the Impartial Expert, Readings In Law and Psychiatry (rev. ed. R. Allen, E. Ferster & J. Rubin 1975) at 217-219. Moreover, no hearing was ever held regarding this report.

Drope v. Missouri, 420 U.S. 162, 181 (1975); Hansford v. United States, 365 F.2d 920, 924 (D.C. Cir. 1966); Saddler v. United States, supra.

Moreover, in light of Wojtowicz' deteriorated condition at sentencing, and obviously strained relations with counsel, Judge Travia's inquiry into his desire to withdraw his plea and substitute counsel was plainly inadequate in ascertaining the true motivations behind Wojtowicz' actions, particularly where, as here, the defendant stated that it was his male paramour in particular who induced his plea in the first place with threats of imminent desertion.

Obviously, the possible connection between Wojtowicz' mental and physical disabilities and his desire to withdraw his plea deserved far more incisive probing than it received. In a precisely analogous situation, in United States v. Joslin, 434 F.2d 526 (D.C. Cir. 1970), the D.C. Circuit found similar claims of mental instability and conflicts with trial counsel substantial and remanded for an evidentiary hearing:

> The rule is that when, as here, an effort is made to withdraw a guilty plea before sentence the defendant is entitled to an appropriate hearing before the application can be denied. Where factual matters bearing directly in the plea are truly in controversy, an oral colloquy is not an acceptable vehicle for resolving them. In this instance, the

> subjects of appellant's mental state and his understanding of his action at the time of the pleas should have been dealt with, not in the form of colloquy or argument, but by "the following of at least the rudimentary procedural channels for the determination of disputed questions of facts." [citation omitted]. Id., 434 F.2d at 531.

Neither the trial court's reliance on personal observations of Wojtowicz nor the mere facial propriety of plea and sentence colloquies can be determinative. United States v. Masthers, supra, 539 F.2d at 728 (D.C. Cir. 1976) (and cases cited therein). While the trial court's observation of a defendant's apparent rationality and comprehension are relevant to the ultimate determination of competency, these observations alone are an insufficient basis for denying a hearing on that very question.* As the Supreme Court noted in Pate v. Robinson, 383 U.S. 375, 386 (1966):

> While [a defendant's] demeanor at trial

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* Moreover, where, as here, the District Judge conducting the §2255 proceeding is different from the sentencing judge, the Government's reliance upon the transcript of plea and sentence as obviating the necessity for an evidentiary hearing, is even less appropriate. It hardly needs reiteration that a typed transcript does not accurately reflect the demeanor and physical appearance of witnesses. Where serious question exists regarding a defendant's competence, and where, as here, a different District Judge conducts the §2255 proceeding, reliance upon the sentencing judge's observations, in lieu of an evidentiary hearing, is hardly an appropriate substitute.

> might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing in that very issue. Id.; see Rand v. Swenson, 501 F.2d 394, 395 (8th Cir. 1974).

Clearly, under these circumstances, Judge Travia's failure to make specific inquiry into Wojtowicz' mental state at sentencing, where he appeared in deteriorated condition and sought to withdraw his plea, was clear error warranting vacatur of the sentencing. United States v. Masthers, supra. Moreover, in light of the "flurry of warning flags" raised by Wojtowicz' condition at sentencing, further inquiry must be made regarding Wojtowicz' guilty plea, a scant two months earlier. Saddler v. United States, supra, 531 F.2d at 87.

C. Voluntariness of Plea

The District Court erred in failing to consider Wojtowicz' claim that his guilty plea was the product of the coercion of his family, particularly Ernest Aron, Wojtowicz' paramour. Based upon the facts of this case, including Wojtowicz' statements at sentence, as well as the eyewitness reports contained in the news article submitted to the Court below, a substantial question exists as to whether Aron, in fact, coached Wojtowicz at the plea proceeding to properly

answer the Court's Rule 11 colloquy. Moreover, Wojtowicz, himself attempted to withdraw his plea at sentence on the basis that Aron had, in fact, threatened to desert him if he didn't plead guilty.

The facts alleged thus raise the chilling spectre of undue influence exerted on Wojtowicz, given his weakened mental state and the bizarre nature of his psychologically dependent relationship with Aron.

Indeed, the very crime committed bespeaks the unhealthy and utterly morbid nature of Wojtowicz' involvement. Wojtowicz, a first offender with no prior criminal history, robbed a bank to secure funds for his paramour's sex change operation. The crime occurred immediately after the paramour had attempted the latest in a series of suicide attempts. Wojtowicz, himself, had attempted suicide on several occasions and had undergone treatment at St. Vincent's Hospital.

Moreover, according to Wojtowicz' allegations, as well as the news article submitted to the District Court, Aron is alleged to have coached Wojtowicz' responses at the plea proceedings. Considering the bizarre nature of the relationship between the two, given Wojtowicz' obviously passive-dependent personality, it is hardly far-fetched

to surmise that Aron could very well have induced and coerced his guilty plea just as easily as he provoked this obviously-disturbed defendant to transgress the criminal law for the first time in his life.

These factors distinguish Wojtowicz' plight from Lunz v. Henderson, 533 F.2d 1322 (2d Cir. 1976). In Lunz, no serious claim was made that either the defendant's mental state or the nature of his relationship with his sister was such as to render the impact of his family's importunings coercive. Certainly, in this case, it hardly may be claimed that Aron was a family member who proceeded with the defendant's best interests at heart.

Clearly, then, what is critical in this context, is not only whether Wojtowicz knew what he was doing when he pleaded guilty but also why. United States ex rel. Brown v. La Vallee, 424 F.2d 457, 460 (2d Cir.), cert. denied, 401 U.S. 942 (1970). Under these circumstances, where serious question exists regarding the extent of the coercive impact of Aron's importunings upon Wojtowicz' plea, it was error for the Court below to dismiss Wojtowicz' claims absent an evidentiary hearing.*

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* It should be noted that, in each of this Court's

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D. Sentence Promise

The Government, as did the Court below, dismisses the sentence promisemade by Wojtowicz' attorney as a mere "sentence estimate" upon which Wojtowicz, and his family, relied at their peril. As such, the Government argues, even if such a promise was, in fact, made, it did not constitute an improper inducement to plead guilty.*

Such an argument utterly misconceives the impact of the nature of a sentence promise upon an inexperienced first-offender and his family. When such promises are extended, whether predicated as estimates or predictions, the effect upon an untutored defendant can, in specific

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most recent considerations of the effect of familial coercion upon a plea's voluntariness (Brown, Lunz and United States ex rel. Curtis v. Zelker, 466 F.2d 1092 (2d Cir. 1972), an evidentiary hearing was deemed necessary before the claims were rejected.

* Contrary to the Government's assertions, Wojtowicz' pro se petition to the Court below explicitly stated that his attorney had made him a sentence promise of ten or fifteen years. (Exhibit 7, Appendix, at 3). United States ex rel. Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Cir. 1975); The relief sought was either modification or "vacature" of the sentence. (See Heath Affidavit, Exhibit 7, Appendix). Given the flexibility allowed the trial court in affording appropriate relief for a broken sentence promise, Santobello v. New York, 404 U.S. 257 (1971); United States ex rel. Selikoff v. Commissioner of Correction, 524 F.2d 650, 654 (2d Circ. 1975); Mosher v. LaVallee, 351 F. Supp 1101 (S.D.N.Y. 1972) (outright vacatur or specific performance of "bargain" permissable), the District Court was hardly bound by the specifics of Wojtowicz' pro se prayer for relief.

circumstances, be as substantial as a promise directly conveyed by a prosecutor or the court. Clearly, Wojtowicz and his family, inexperienced as they were in such matters, did not incisively probe the extent or nature of the "bargain". They relied naively upon the sentence promise they were led to believe had been struck, to their utter detriment.

While such sentence promises from attorneys are looked upon with exceeding disfavor, under certain circumstances, such "mere predictions" may well entitle a defendant to relief. In People v. Gray, 29 Mich. App. 301, 185 N.W.2d 123 (1970), the Court was confronted with similar contentions to those pressed here, where a defendant, with the support of other witnesses, testified at an evidentiary hearing that his attorney assured him probation if he pleaded guilty. The attorney, however, testified that he told the defendant only that there was a "reasonable chance" for probation. In a separate concurring opinion, Judge Charles L. Levin observed:

> "Far too frequently claims of this kind are made and, while many, perhaps most, are baseless, as long as we permit, indeed encourage by the plea-bargaining process, lawyers to "merely predict" to their clients that they may be placed on probation, we must expect that accused persons, grasping for straws, will not stop to scrutinize with lawyer-like care the words used by a trusted representative and confidant, an officer of the court, and will share their lawyer's mere "hope" and act on it.

> [T]he issue is not whether particular words were used; the true question is, was [the defendant] led to believe that he would be placed on probation?
>
> The line between a promise and an expression of hope, expectation or a mere prediction, can be most subtle....[A]t various times in our lives we all justifiably rely and act upon assurances which could not technically be called unconditional promises.
>
> Here the expression was by a seasoned lawyer to his youthful client. In such a case, I would think that a strong disclaimer by the lawyer should be required to avoid misleading the client; not a mere incantation of words: "It is, of course, up to the judge." Id., 29 Mich. App. at 307; 185 N.W.2d at 126.(Levin, J. concurring).

Such an observation points to the resolution of the instant case. Wojtowicz, as well as three members of his family, submitted affidavits alleging that a sentence promise had been conveyed by his attorney. Mosher v. LaVallee, supra. Irrespective of the characterization of this promise, it was relied upon by Wojtowicz en famille with the same force and effect as if it had been directly communicated from the court or prosecutor. Accordingly, an evidentiary hearing is, thus, necessary to resolve these substantial claims. United States ex rel. Oliver v. Vincent, 498 F.2d 340 (2d Cir. 1974).

POINT II

THE DISTRICT COURT ERRED IN FAILING TO CONSIDER WOJTOWICZ' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

While the Government seeks to make light of Wojtowicz' substantial contentions* regarding the failure of his court-assigned, and subsequently privately-retained, attorney, to protect adequately his rights and to prosecute zealously the one substantial defense available (insanity), the record reveals that, taken in their totality, these claims present a substantial question as to whether counsel's conduct has, in effect, blotted out the essence of a substantial defense or protected Wojtowicz' interests in the constitutionally required manner. United States ex rel. Johnson v. Vincent, 370 F.Supp.379 (S.D.N.Y.)(Bauman, J.), rev'd on other grounds, 507 F.2d 1309 (2d Cir. 1974). Upon the facts of this case, it was error to dismiss these claims absent an evidentiary hearing.

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* Contrary to the Government's assertions, Wojtowicz raised his claims regarding ineffective assistance of counsel in the Court below. Besides raising the issue at the time of sentencing, Wojtowicz addressed the claim in his Traverse (Exhibit 8, Appendix); Motion for Reconsideration (Exhibit 9, Appendix); handwritten pro se affidavit (Exhibit 10, Appendix); and Petition for Sentence Modification (Exhibit 11, Appendix). Given the liberality with which pro se pleadings are to be construed, it cannot be said that these claims were not fairly, albeit unorthodoxly, presented to the Court below.

Sentencing

The Government seeks to excuse counsel's inexcusable conduct in failing to bring Wojtowicz' suicide attempt to the sentencing judge's attention. The Government disingenuously labels it an "informed" decision made after careful evaluation of Wojtowicz' mental state, in which counsel exercised his unilateral judgment in deciding that it was "unnecessary" to inform the Court of Wojtowicz' bizarre actions. Cf. Tillery v. Eyman, 492 F.2d 1056 (9th Cir. 1974).

Such a characterization is arrant nonsense. Counsel's failure to apprise the sentencing judge of this sudden change in his client's condition served not only to deprive the Court of the requisite information upon which to intelligently exercise its discretion, sua sponte, regarding bizarre conduct outside the court's presence, cf. United States v. Meerbeke, ___ F.2d ___, Dkt. No. 76-1278 (2d Cir. December 29, 1976), but also deprived a possibly-incompetent defendant of his due process rights. Pate v. Robinson, supra.

Moreover, counsel's failure to bring this suicide attempt to the court's attention was all the more deleterious

here, where Wojtowicz actively sought to have counsel replaced for failure to actively defend his interests. Under strikingly similar circumstances, the D.C. Circuit, in United States v. Joslin, supra, 434 F.2d at 529-530, held that, where defense counsel, whom the defendant had previously requested be replaced for failure to act in defendant's best interests, was technically still his lawyer during a hearing on defendant's request to withdraw his guilty plea, and counsel said nothing to support withdrawal of pleas, and made points against his client, the defendant had plainly been denied effective assistance of counsel, particularly where, as here, there had been no serious exploration by counsel of his client's mental state.

Clearly, in this case, where serious allegations were made at sentencing by this possibly-incompetent defendant regarding his counsel's malfeasance, and where counsel's position, at sentencing, vis-a-vis his client, was ambiguous, at best, it was error to have dismissed this claim without an appropriate evidentiary hearing. United States v. Morrissey, 461 F.2d 666 (2d Cir. 1972).

Failure to Explore Insanity Defense

The Government would have this Court believe that Wojtowicz' attorney, an "experienced" criminal lawyer, allowed his client to plead guilty only after having fully "explored" the possibility of an insanity defense in this case.

For aught that appears in the record, counsel's efforts in this regard appear to have ceased immediately upon receipt of the Kings County Hospital psychiatric report, six weeks after the crime. The record reflects, however, that the Kings County examination was not addressed to the question of mental responsibility at the time of the crime, but, rather, was limited strictly to the question of competency to stand trial. Cf. United States v. Reifsteck, 535 F.2d 1030, 1033 (8th Cir. 1976); Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973).

Thereupon, it appears that Wojtowicz' attorney abandoned all efforts at following up this competency report with any independent investigation of his own, particularly where, as here, it was requested by the defendant. Certainly, a psychiatric expert was available under 18 U.S.C. §3006A(e) to explore an insanity defense,

and, indeed, irrespective of the findings of any competency examination, the District Court would have been hard-pressed to deny this application. United States v. Durant, ___ F.2d ___, Dkt. No. 76-1198 (2d Cir. November 24, 1976).

Moreover, it may not seriously be argued that a mental responsiblity defense would not have been substantial in this case. Cf. United States v. Bright, 517 F.2d 584 (2d Cir. 1975). Wojtowicz had robbed a bank to steal funds for his male paramour's sex change operation. The crime, by a first offender, was not committed for the usual motives of pecuniary gain, and, indeed, based upon the substantial evidence of the nature of the paramour's relationship, as well as the circumstances of the guilty plea, it would not have been far-fetched to have explored a defense of duress. Wojtowicz' counsel, however, followed up none of these substantial possibilities even minimally.

Clearly, counsel's complete failure to explore an insanity defense in this case is distinguishable from the half-hearted investigation conducted by counsel in United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973). Indeed, in this context, counsel's complete failure to seek an

expert to make even a minimal exploration of this defense may, in and of itself, constitute ineffective assistance of counsel. Cf. United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974) with United States v. Walker, 537 F.2d 1192 (4th Cir. 1976).

It is manifest that, where Wojtowicz was charged with a capital offense (18 U.S.C.§2113 (e)), the duty owed by counsel to exhaustively and imaginatively explore every possible avenue is even more compelling than that customarily required. United States ex rel. Marcelin v. Mancusi, supra, (Kaufman, J. dissenting). The record fails to demonstrate that such effort was properly exerted on Wojtowicz' behalf. Accordingly, the District Court erred in failing to consider these substantial claims absent an evidentiary hearing. Heard v. United States, 390 F.2d 866 (D.C. Cir. 1968).

Negotiation of Movie Rights

The Government misconstrues Wojtowicz' allegations regarding counsel's negotiation of the movie rights. The facts reveal that counsel not only negotiated these rights, but also became privately-retained out of the proceeds shortly thereafter. Indeed, the facts reveal that the extent of counsel's compensation turned on how much was to be expended in preparation for trial. Counsel himself admitted this at sentencing, when he informed the Court that, in light of his

client's guilty plea, there would be no need to go to the "expense" of hiring a defense psychiatrist.

Under strikingly similar facts, the Sixth Circuit, in Ray v. Rose, 491 F.2d 285 (6th Cir. 1974), remanded such a claim for an evidentiary hearing, where it appeared that counsel for the alleged assassin of Martin Luther King stood to profit from sale of the book and movie rights, undertook no active investigation of the case against their client, and actively pressured him to plead guilty.

In evaluating the conduct of counsel, this Court has recently commented that, "Professional integrity, not financial reward, is currently the only incentive for an experienced attorney to prepare thoroughly when he acts as appointed counsel." Rickenbacker v. The Warden, Auburn Correctional Facility, F.2d. , Dkt No. 76-2036 (2d Cir. December 22, 1976) at 1073 n.5. Clearly, Wojtowicz' serious allegations against his attorney, taken in the totality of this record, warrant an evidentiary hearing.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Wojtowicz' main brief, the order of the District Court should be reversed and the matter remanded for an evidentiary hearing.

Dated: New York, New York
January 3, 1977

Respectfully submitted,

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C 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN STANLEY WOJTOWICZ

Plaintiff

against

UNITED STATES OF AMERICA

Defendant

Index No. 76-2106

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
400 C.P.W., NEW YORK, N.Y. 10025

That on the 4th day of January, 1977 deponent served the annexed
REPLY BRIEF
on DAVID G. TRAGER, US Atty, E.D.N.Y.
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 4th day of January 1977

Edward M. Chikofsky
The name signed must be printed beneath
EDWARD M. CHIKOFSKY

[signature]
[illegible] D. ULLMAN
[illegible] Public, State of New York
No. 24-4523548
Qualified in Kings County
Commission Expires March 30, 1977